Supreme Court, U.S.
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No. 01-

IN THE
Supreme Court of the United States

NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PENNSYLVANIA,
Petitioner,

v.

TEXTRON FINANCIAL CORPORATION,
Respondent.

**Petition for a Writ of Certiorari
to the Court of Appeal of California,
Fourth Appellate District**

PETITION FOR A WRIT OF CERTIORARI

MITCHELL C. TILNER
PETER ABRAHAMS
HORVITZ & LEVY L.L.P.
15760 Ventura Boulevard
18th Floor
Encino, California 91436
(818) 995-0800

JOHN G. ROBERTS, JR.*
CATHERINE E. STETSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

* Counsel of Record

Counsel for Petitioner

QUESTION PRESENTED

Should this Court grant the petition, vacate the judgment below, and remand for further consideration in light of the intervening decision in *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001), which held that a court of appeals must review *de novo* a judgment awarding punitive damages?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner National Union Fire Insurance Company of Pittsburgh, Pennsylvania, was the defendant, appellant, and cross-appellee below. Respondent Textron Financial Corporation was the plaintiff, appellee, and cross-appellant below. Petitioner is wholly owned by American International Group, Inc., and has one non-wholly-owned subsidiary, JI Accident & Fire Insurance Co., Ltd. (Japan).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
INTRODUCTION	2
STATEMENT OF THE CASE	3
REASON FOR GRANTING THE WRIT	9
THE DECISION BELOW WAS RENDERED PRIOR TO, AND CONFLICTS WITH, THIS COURT'S DECISION IN *COOPER INDUSTRIES*	9
CONCLUSION	16

TABLE OF CONTENTS—Continued

Page

APPENDICES

Appendix A: Opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division Three (January 29, 2001) 1a

Appendix B: Judgment of the Superior Court of the State of California, Orange County (May 29, 1996) 26a

Appendix C: Order of the Superior Court of the State of California, Orange County (July 29, 1996) 36a

Appendix D: Consent to Remittitur (August 12, 1996) 41a

Appendix E: Order of the Supreme Court of California (May 2, 2001) 43a

Appendix F: Order of the Supreme Court of California (May 4, 2001) 44a

TABLE OF AUTHORITIES

Page

CASES:

AMCA Int'l Fin. Co. v. *Hilgedick*, 499 U.S. 972 (1991) 10

Bertero v. *National General Corp.*, 529 P.2d 608 (Cal. 1974) 12

BMW of North America, Inc. v. *Gore*, 517 U.S. 559 (1996) ..... *passim*

Church of Scientology v. *Wollersheim*, 499 U.S. 914 (1991) 10

Cooper Industries, Inc. v. *Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001) ..... *passim*

Crawford v. *Southern Pacific Co.*, 45 P.2d 183 (1935) 15

Devlin v. *Kearny Mesa AMC/Jeep/Renault, Inc.*, 202 Cal. Rptr. 204 (Cal. Ct. App. 1984) 12

Fortman v. *Hemco*, 259 Cal. Rptr. 311 (Cal. Ct. App. 1989) 12

Haynes v. *Washington*, 373 U.S. 503 (1963) 7

Henry v. *City of Rock Hill*, 376 U.S. 776 (1964) 10

Hilliard v. *A.H. Robins Co.*, 196 Cal. Rptr. 117 (Cal. Ct. App. 1983) 12

TABLE OF AUTHORITIES—Continued

Page

CASES:

Honda Motor Co. v. *Oberg*, 512 U.S. 415 (1994) 7

International Soc. of Krishna Consciousness v. *George*, 499 U.S. 914 (1991) 10

Lane v. *Hughes Aircraft Co.*, 993 P.2d 388 (Cal.), *cert. denied*, 121 S. Ct. 307 (2000) 13

Lawrence v. *Chater*, 516 U.S. 163 (1996) 10

National Auto. & Cas. Co. v. *Industrial Accident Comm'n*, 206 P.2d 841 (Cal. 1949) 13

Neal v. *Farmers Ins. Exchange*, 582 P.2d 980 (Cal. 1978) 12

Ornelas v. *United States*, 517 U.S. 690 (1996) 7, 9, 13

Pacific Lighting Corp. v. *MGW, Inc.*, 499 U.S. 915 (1991) 10

Pacific Mutual Life Ins. Co. v. *Haslip*, 499 U.S. 1 (1991) 10, 14-15

Patrick v. *Maryland Cas. Co.*, 267 Cal. Rptr. 24 (Cal. Ct. App. 1990) 13

San Paolo U.S. Holding Co. v. *Simon*, 121 S. Ct. 2190 (2001) 13, 15

Shade Foods, Inc. v. *Innovative Prods. Sales & Mktg., Inc.*, 93 Cal. Rptr. 2d 364 (Cal. Ct. App. 2000) 12, 13

TABLE OF AUTHORITIES—Continued

Page

CASES:

Stevens v. *Owens-Corning Fiberglas Corp.*, 57 Cal. Rptr. 2d 525 (Cal. Ct. App. 1996) 7, 11

Stutson v. *United States*, 516 U.S. 193 (1996) 10

Summer v. *Mata*, 449 U.S. 539 (1981) 11

Transamerica Occidental Life Ins. Co. v. *Koire*, 500 U.S. 950 (1991) 10

United States v. *Bajakajian*, 524 U.S. 321 (1998) 9

United States v. *Diebold*, 369 U.S. 654 (1962) 11

CONSTITUTIONAL PROVISION:

U.S. Const. amend. XIV ..... *passim*

STATUTES:

28 U.S.C. § 1257(a) 2

Cal. Ins. Code § 790.035 15

OTHER AUTHORITY:

9 Witkin, Cal. Procedure § 359 (4th ed. 1997) 13

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**Petition for a Writ of Certiorari
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PETITION FOR A WRIT OF CERTIORARI

National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union") respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of California, Fourth Appellate District, in this case.

OPINIONS BELOW

The January 29, 2001, Opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division Three is unreported and reproduced in the appendix hereto ("App.") at 1a. The May 29, 1996, Judgment of the Superior Court of the State of California, Orange County, is unreported and reproduced at App. 26a. The July 29, 1996, Order

of the Superior Court conditionally granting a new trial is unreported and reproduced at App. 36a. The May 2, 2001, Order of the Supreme Court of California denying National Union's petition for review is unreported and reproduced at App. 43a. The May 4, 2001, Order of the Supreme Court of California correcting a clerical error in its earlier Order is unreported and reproduced at App. 44a.

JURISDICTION

The judgment of the Court of Appeal was entered on January 29, 2001. On May 2, 2001, the Supreme Court of California denied National Union's timely petition for review. App. 43a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall * * * deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, sec. 1.

INTRODUCTION

Petitioner National Union appealed a $1.7 million punitive damages award to the California Court of Appeal, arguing that the award was excessive and violated National Union's right to due process under the Fourteenth Amendment to the United States Constitution. The Court of Appeal affirmed the award after declaring that the judgment below was "presumed to be correct" and reviewing the record "most favorably to the judgment." App. 24a. National Union petitioned the Supreme Court of California to review the decision, arguing that the Court of Appeal had failed to conduct a *de novo* review of the trial court's judgment to ensure that the punitive damages award comported with the Fourteenth Amendment. The Supreme Court of California denied National Union's petition without comment.

Twelve days after the Supreme Court of California denied review, this Court issued *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 121 S. Ct. 1678, 1685-86 (2001), holding that "courts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards." As it has done once already with a decision from the California Court of Appeal, this Court should grant certiorari, vacate the decision of the Court of Appeal in this case, and remand to allow the court to consider this case in light of the intervening decision in *Cooper Industries*.

STATEMENT OF THE CASE

Background.

This $1.7 million punitive damages case arises out of a claim for damage to a bus. In 1992, Il Sung Ko, the operator of a Los Angeles tour company, sought to purchase an insurance policy covering his fleet of buses. Through Douglas Ferguson, an independent insurance broker, Ko obtained a National Union insurance policy issued by TRM International ("TRM"), an independent company acting as a "managing general agent" for National Union.[1] Respondent Textron Financial Corporation ("Textron") had a security interest in one of Ko's buses and was named as loss payee on the National Union insurance policy. The "loss payable" endorsement on the policy specified that if National Union were to cancel the policy, Ko and Textron would receive "the same advance notice."

After he purchased the National Union policy, Ko's financial situation declined, and he purportedly stopped using two of his buses, including the bus financed by Textron. Ferguson advanced Ko several thousand dollars in insurance premiums during that time. In late 1992, when Ko was

[1] The term "managing general agent" is a term of art in the insurance field; it describes a company that markets and issues insurance policies on behalf of insurance companies pursuant to an agency agreement.

unable to pay Ferguson back and after National Union threatened to cancel Ko's policy, Ko and Ferguson requested that TRM delete coverage of the two supposedly idle buses and issue a "premium credit" for the deleted vehicles. The deletion endorsement negotiated by the parties in late 1992 staved off cancellation of Ko's entire policy and enabled him to operate the rest of his fleet; in addition, Ferguson testified that the accompanying refund in the form of a premium credit would have repaid him for the substantial amount of money he had fronted to Ko. TRM prepared an endorsement to the policy stating that coverage for the bus had been deleted. Although TRM's records indicate that a copy of the endorsement was mailed to Textron, Textron denied receiving it. [2]

Ko continued to use the Textron-financed bus despite claiming to have garaged it, and in January 1993, the bus was involved in an accident. Ferguson notified the American International Adjustment Company ("AIAC")—a company affiliated with National Union and vested with authority to investigate, approve, defend, or deny claims by or against National Union insureds—that the accident had occurred, and that Ko had previously requested the bus be deleted from the policy. A TRM supervisor confirmed Ferguson's statement, and AIAC accordingly informed Ko that coverage would be denied.

Textron learned about the accident—and the deletion from the policy of the bus it had financed—several months later, after Ko defaulted on his loan obligations. Textron sued Ko for the balance due on the loan and secured a judgment against him, which Ko subsequently discharged in a bankruptcy proceeding. Textron also submitted a claim to National Union for $61,000 in property damage. After a lengthy investigation, National Union denied Textron's

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[2] The deletion endorsement was effective as of December 1, 1992, but was not generated until February 1993. According to TRM, the delay was attributable to a backlog in administrative paperwork.

claim, concluding that it was not obligated under the policy to notify Textron of the cancellation by Ko.

Textron then sued National Union and AIAC, alleging breach of contract, breach of the covenant of good faith and fair dealing, conspiracy, and fraud.[3] Textron's contract claims were based on the parties' dispute over whether the loss payable endorsement required National Union to provide a lienholder with advance notice if a vehicle was deleted at the insured's request. Textron's conspiracy and fraud claims were grounded in a more sinister theory, however: that in fact the bus had not been deleted from the policy before the accident. According to Textron, following the accident, various TRM employees had engaged in a complicated "post-accident underwriting" scheme to mislead Textron into believing that coverage for the bus had been canceled before the accident, when in fact the bus was subject only to a "lay up credit"—a procedure sometimes used by a commercial insured with a fleet of vehicles who experiences a temporary lull in business. Under a lay up credit, coverage remains in effect, but the insurer provides a credit for the period of time the vehicle temporarily is out of service. Textron further claimed that TRM officials had fabricated various documents to support its position that the bus had been deleted from the policy, and that National Union and AIAC had subsequently ratified TRM's deception by vigorously defending the coverage denial. According to Textron, the purpose of this intrigue was to deny Textron—which paid National Union millions of dollars a year in insurance premiums—a $61,500 property damage claim.

At trial, the court ruled that National Union could not terminate Textron's rights as a loss payee without advance notice to Textron. Textron's contract damages claim, its claim for insurance bad faith, and its fraud and conspiracy

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[3] Textron also brought claims against National Union and AIAC under California's unfair business practices statute. Those claims were dismissed prior to trial. In the same complaint, Textron also sued TRM and Ferguson for negligence. Both settled before trial.

claims were then tried to a jury, which found National Union liable for the money payable under the insurance policy. App. 27a. The jury also concluded that National Union had committed insurance bad faith, rendering the company liable for approximately $86,000 in attorney's fees and costs incurred by Textron to prosecute this action. App. 34a. The jury further concluded that AIAC had not made misrepresentations knowingly or with an intent to defraud, but that National Union had made such representations. App. 29a-30a. The jury awarded Textron $3,859.50 in compensatory damages on its fraud claim, representing the legal fees incurred when, relying on National Union's purported misstatements that coverage had been deleted, Textron pursued Ko for damages. App. 31a. The jury then awarded Textron $10 million in punitive damages against National Union. App. 34a.

On National Union's motion, the Superior Court granted a conditional new trial, unless Textron agreed to a remittitur of the punitive damage award to $1.7 million. App. 40a. Textron accepted the remittitur, App. 41a-42a, and National Union appealed.[4]

The Decision of the California Court of Appeal.

On appeal, National Union argued that even with the trial court's remittitur, $1.7 million in punitive damages was excessive and violated National Union's right to due process under the Fourteenth Amendment to the United States Constitution. National Union explained that the three "guideposts" set forth by this Court in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 575-585 (1996)—the reprehensibility of the defendant's conduct, the ratio of punitive damages to the plaintiff's actual harm, and comparable civil or criminal penalties arising from the same conduct—mandated a finding that the trial court had erred in awarding Textron a colossal sum in punitive damages on a

[4] Textron filed a cross-appeal, claiming, among other things, that the trial court erred in granting the remittitur.

claim for a small fraction of that amount. Addressing each *BMW* factor at length, National Union argued that the trial court's punitive damages award constituted an "arbitrary deprivation of property" in violation of the Fourteenth Amendment's due process clause. *See Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994).

The Court of Appeal affirmed. App. 1a, 25a. Citing its decision in *Stevens* v. *Owens-Corning Fiberglas Corp.*, 57 Cal. Rptr. 2d 525 (Cal. Ct. App. 1996), the court announced that "[o]n appeal, a judgment awarding punitive damages *is presumed to be correct* and will be reversed only if the record, *viewed most favorably to the judgment*, reflects the award is the result of passion or prejudice." App. 24a (emphases added). Observing only that "the evidence reflects National Union engaged in reprehensible conduct" and that "the award necessarily had to be large to affect a corporate entity such as National Union," the Court of Appeal concluded that the $1.7 million punitive damages award was "not excessive, nor does it violate National Union's constitutional right to due process of law." App. 25a.

Following the Court of Appeal's decision, National Union filed a petition for review in the Supreme Court of California, arguing that the appellate court had failed to "conduct an independent review of the size of a punitive damage award" to ensure the award conformed with the Fourteenth Amendment. Pet. for Review 1. Citing (among other cases) *Ornelas* v. *United States*, 517 U.S. 690, 697 (1996) and *Haynes* v. *Washington*, 373 U.S. 503, 515 (1963), National Union argued that the United States Supreme Court had consistently held that review of constitutional claims should be *de novo*, but that the Court of Appeal had taken a far more permissive approach.

Indeed, the Court of Appeal had failed entirely to examine the three factors identified in *BMW* v. *Gore*. The court

concluded that National Union's conduct was "reprehensible"—a precursor to any punitive damages award—but did not determine to what degree National Union's conduct was reprehensible. *See BMW*, 517 U.S. at 575. The court concluded that the damages award "had to be large" to affect National Union, App. 24a, and that "no fixed ratio exists to determine the proper proportion between" compensatory and punitive damages, *id.* at 25a, but it did not determine whether a $1.7 million judgment was excessive when compared to Textron's comparatively minimal damages. *See BMW*, 517 U.S. at 582-583. And it failed to consider analogous civil and criminal penalties for similar acts. *See id.* at 583-584. National Union explained that the Court of Appeal had completely abdicated its obligation to independently examine whether the punitive damage award passed constitutional muster by essentially rubber-stamping the trial court's decision. The Supreme Court of California denied review without comment on May 2, 2001. App. 43a.

Cooper Industries.

Less than two weeks after the Supreme Court of California denied review, this Court decided *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001). Reviewing a case from the Ninth Circuit, this Court held that "courts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards." 121 S. Ct. at 1685-86.

This Court explained that the Fourteenth Amendment's due process clause imposes "substantive limits" on States' discretion to punish by prohibiting States from imposing "grossly excessive" deprivations of life, liberty or property. *Id.* at 1684. In reviewing excessive punishment cases, this Court stated, it had routinely engaged in an "independent examination of the relevant criteria" informing a ruling on excessiveness: the degree of the defendant's culpability; the

"relationship between the penalty and the harm to the victim;" and the "sanctions imposed in other cases for comparable misconduct." *Id.* at 1684-85.

This Court noted that in *United States* v. *Bajakajian*, 524 U.S. 321 (1998), which held that a punitive forfeiture of approximately $350,000 for violating a reporting requirement was grossly disproportional to the offense, it had specifically stated that "courts of appeals must review the proportionality determination '*de novo*'," rejecting respondent's argument that the trial court's ruling on excessiveness should be reviewed for abuse of discretion. *Cooper Industries*, 121 S. Ct. at 1685 (quoting *Bajakajian*, 524 U.S. at 336-337 n.10). This Court had applied the same standard in *Ornelas*, 517 U.S. at 696, holding that a trial court's determinations on reasonable suspicion and probable cause should be examined *de novo* by a reviewing court. *See Cooper Industries*, 121 S. Ct. at 1685.

Because punitive damage awards, like the determinations in *Bajakajian* and *Ornelas*, implicate constitutional questions, this Court held that reviewing courts must apply a *de novo* standard of review when assessing the constitutionality of punitive damage awards. *Id.* at 1685-86. The Ninth Circuit had applied a less exacting standard, reviewing the district court's punitive damages ruling for abuse of discretion. *Id.* at 1682. This Court accordingly vacated the judgment and remanded. *Id.* at 1689.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW WAS RENDERED PRIOR TO, AND CONFLICTS WITH, THIS COURT'S DECISION IN *COOPER INDUSTRIES*.

This Court issued its decision in *Cooper Industries* twelve days after the Supreme Court of California denied National Union's petition for review of the decision of the Court of Appeal. Certiorari should be granted and the Court of

Appeal's decision vacated and remanded for consideration in light of *Cooper Industries*.

1. This Court will grant certiorari, vacate a judgment, and remand ("GVR") when it concludes that intervening precedent is "sufficiently analogous and, perhaps, decisive to compel re-examination of the case." *Henry* v. *City of Rock Hill*, 376 U.S. 776, 777 (1964). "Where intervening developments * * * reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is * * * potentially appropriate." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam).[5] As this Court has explained, "a GVR order both promotes fairness and respects the dignity of the Court of Appeals by enabling it to consider potentially relevant decisions and arguments that were not previously before it." *Stutson* v. *United States*, 516 U.S. 193, 197 (1996). A GVR order is warranted here, because the California Court of Appeal clearly applied the standard disapproved by *Cooper Industries* when it reviewed the punitive damages judgment.

When it reviewed the constitutionality of the trial court's punitive damage award, the Court of Appeal stated that "a judgment awarding punitive damages is *presumed to be correct*," and that the award would be reversed "only if the

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[5] For example, following its decision in *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 20 (1991), which stressed the importance of "meaningful and adequate review" of juries' punitive damages determinations, this Court granted, vacated, and remanded several decisions of the California Court of Appeal for consideration in light of *Haslip*. *See Transamerica Occidental Life Ins. Co.* v. *Koire*, 500 U.S. 950 (1991); *AMCA Int'l Fin. Co.* v. *Hilgedick*, 499 U.S. 972 (1991); *Pacific Lighting Corp.* v. *MGW, Inc.*, 499 U.S. 915 (1991); *Church of Scientology* v. *Wollersheim*, 499 U.S. 914 (1991); *International Soc. of Krishna Consciousness* v. *George*, 499 U.S. 914 (1991).

record, *viewed most favorably to the judgment*, reflects the award is the result of passion or prejudice." App. 24a (emphases added). That is a strange admixture of standards of review; but the one certain thing is that the Court of Appeal's review was not *de novo*. "Presum[ing]" the punitive damage award to be correct smacks of the typical standard of appellate review of certain factual findings. *See, e.g.*, *Summer* v. *Mata*, 449 U.S. 539, 550 (1981) (state court factual findings presumed to be correct for purposes of federal habeas review); *compare Cooper Industries*, 121 S. Ct. at 1686 (concluding that "the jury's award of punitive damages does not constitute a finding of 'fact' "). And to view the record "most favorably to the judgment" awarding punitive damages means to accord the lower court's decision deference—deference this Court has since found inappropriate in reviewing the constitutionality of a punitive damages award. Of course, a court of appeals reviews *de novo* a grant of summary judgment by viewing the record in the light most favorable to the *nonmovant*—the same standard the trial court applies. *See United States* v. *Diebold*, 369 U.S. 654, 655 (1962). But that is far different than reviewing the record "most favorably to the *judgment*;" that standard requires deference to the original decisionmaker, and is inappropriate after *Cooper Industries*.

2. As support for its standard of review, the Court of Appeal cited *Stevens* v. *Owens-Corning Fiberglas Corp.*, 57 Cal. Rptr. 2d 525 (Cal. Ct. App. 1996). That case confirms that the Court of Appeal misperceived its role. *Stevens* held that when determining whether a punitive damages award is excessive, "[a]ll presumptions favor the correctness of the verdict and judgment," and that while the "trial court's approval of the punitive damage award * * * is not binding on appeal, * * * we must give it significant weight." *Id.* at 533. The Court of Appeal's statement in this case that the lower court's verdict was "presumed to be correct" was

drawn directly from the deferential *Stevens* standard of review.

This case and *Stevens* are not aberrations; the California appellate courts have consistently endorsed the deferential standard of review employed in those cases. In *Bertero* v. *National General Corp.*, 529 P.2d 608, 624 n.12 (Cal. 1974), for example, the Supreme Court of California announced that it would continue to apply the "historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice." In *Neal* v. *Farmers Ins. Exchange*, 582 P.2d 980, 986 (Cal. 1978), as in this case, the trial court conditionally granted defendants' motion for new trial unless the plaintiff consented to a remittitur. The defendant challenged the punitive damages award remaining after remittitur, and the California Supreme Court affirmed the lower court's damages award after an "examination of the whole record in the light most favorable to the judgment." *Id.* And in *Fortman* v. *Hemco*, 259 Cal. Rptr. 311, 322 (Cal. Ct. App. 1989), the Court of Appeal expressly stated that when a reviewing court examines whether an award of punitive damages was excessive, "*it does not act de novo.*" (Emphasis added.) Rather, that court explained, the trial court's determination is " 'entitled to great weight,' " with "all presumptions favor[ing] the trial court's determination," and the court must "review the record in the light most favorable to the judgment." *Id.* (quoting *Hilliard* v. *A.H. Robins Co.*, 196 Cal. Rptr. 117, 144 n.28 (1983)). *See also Devlin* v. *Kearny Mesa AMC/Jeep/Renault, Inc.*, 202 Cal. Rptr. 204, 211 (Cal. Ct. App. 1984) (reviewing punitive damages award in "light most favorable to the judgment").

Similarly, other California decisions have upheld a punitive damages award if it is "supported by substantial evidence." *Shade Foods, Inc.* v. *Innovative Prods. Sales & Mktg., Inc.*, 93 Cal. Rptr. 2d 364, 395 (Cal. Ct. App. 2000), *citing*

National Auto. & Cas. Co. v. *Industrial Accident Comm'n*, 206 P.2d 841 (Cal. 1949); *Patrick* v. *Maryland Cas. Co.*, 267 Cal. Rptr. 24, 30 (Cal. Ct. App. 1990). As the *Shade Foods* court put it, substantial evidence review requires the court to " 'consider the evidence in the light most favorable to the prevailing party, giving him the benefit of every reasonable inference, and resolving conflicts in support of the judgment.' " 93 Cal. Rptr. 2d at 395 (quoting 9 Witkin, Cal. Procedure § 359, at 408 (4th ed. 1997)). The "substantial evidence" formulation of the California standard of review of punitive damages awards is equally suspect after *Cooper Industries*. *See San Paolo U.S. Holding Co.* v. *Simon*, 121 S. Ct. 2190 (2001) (granting certiorari, vacating, and remanding to California Court of Appeal for consideration in light of *Cooper Industries*).

3. It has not gone unnoticed that California's deferential standard of review lags behind the times. As one California Supreme Court justice recently observed, the deferential standard regularly employed by the courts of that State inhibits appellate courts "in providing guidance to trial courts as to how their broad discretion should be exercised. * * * [W]ithout clear guidance, judicial oversight of punitive damage awards will not be uniform, and the resulting gross variability in awards will ultimately implicate the rights of defendants to due process and the equal protection of the laws." *Lane* v. *Hughes Aircraft Co.*, 993 P.2d 388, 398 (Cal.) (Brown, J., concurring), *cert. denied*, 121 S. Ct. 307 (2000). That statement, which echoed this Court's observation in *Ornelas* that *de novo* review of constitutional determinations was necessary to "unify precedent and stabilize the law," 517 U.S. at 697-698, presaged as well this Court's statements to the same effect in *Cooper Industries*. *See* 121 S. Ct. at 1685 (citing *Ornelas*, 517 U.S. at 697-698 and *BMW*, 517 U.S. at 587).

4. Remand is particularly warranted here because, as in *Cooper Industries*, a "thorough, independent review" of the

punitive damages award "might well have led the Court of Appeals to reach a different result." 121 S. Ct. at 1688.

The first factor enumerated by this Court in *BMW*, and "[p]erhaps the most important indicium of the reasonableness of a punitive damages award," is the "degree of reprehensibility of the defendant's conduct." 517 U.S. at 575. The Court of Appeal remarked only that National Union's conduct was "reprehensible," App. 24a; but *BMW* of course requires a court to examine the *degree*, not just the fact, of reprehensibility, in order to pass on the appropriateness of a punitive damages award. The Court of Appeal based its decision affirming the punitive damage award on National Union's purported responsibility for the conduct of its independent agent TRM, expressly declining to decide whether National Union's own conduct, which consisted merely of verifying and defending its coverage decision, supported the punitive damages award. Even if National Union was appropriately held responsible for TRM's actions—a hotly disputed question below—National Union's derivative culpability pales in comparison with that of TRM itself, which settled with Textron for an amount equaling a tiny fraction of the punitive damages leveled against National Union. The conduct for which National Union was held liable caused purely economic harm, *see BMW*, 517 U.S. at 576, was not shown to be a part of any larger pattern of deceitful post-accident underwriting, *id.* at 576-577, and National Union's purported victim was in no sense "vulnerable," but a sophisticated company. *Id.* at 576.

Similarly, if the Court of Appeal had examined the ratio of punitive damages to the actual harm inflicted on Textron, rather than just asserting that National Union was "wealth[y]," App. 24a, the court might have reached a far different conclusion. This Court explained in *Pacific Mutual Life Ins. Co.* v. *Haslip* that a punitive award of "more than 4 times the amount of compensatory damages [and] more than 200 times the out-of-pocket expenses of respondent" was

"close to the line" of constitutional impropriety. 499 U.S. at 23. The ratio between the $1.7 million punitive damages award and the total damages awarded to Textron as a result of National Union's purported fraud and bad faith—just $3,860 in out-of-pocket damages plus $86,000 in attorney's fees awarded under California law—is nearly 20 to 1. Indeed, even including the damages under Textron's contract claim, which did not give rise to the punitive award, the ratio of punitive to total damages *still* exceeded 10 to 1.

Finally, the third *BMW* factor requires an inquiry into the statutory penalty for comparable acts. The Court of Appeal did not examine that factor at all; if it had, it would have found that the maximum statutory penalty established for insurance bad faith is $10,000. Cal. Ins. Code § 790.035. The huge disparity between that statutory sanction and the punitive damage award also justifies a finding that the award violated due process.

5. Finally, this Court has already granted certiorari, vacated, and remanded a decision of the California Court of Appeal following *Cooper Industries*. *See San Paolo U.S. Holding Co.* v. *Simon*, 121 S. Ct. 2190 (2001). In that case, the Court of Appeal affirmed a judgment granting the plaintiff $1.7 million in punitive damages (coincidentally, the same amount at issue here) by "view[ing] the entire record for substantial evidence from which the jury could reasonably conclude that the acts of San Paolo reached the level of reprehensibility to justify the award." *Simon* v. *San Paolo U.S. Holding Co.*, No. B121917 (reprinted in *San Paolo*, No. 00-1457, Pet. App. A-31). Stating that "an appellate court's task * * * 'begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury,' " the Court of Appeal in *Simon* concluded that it would not disturb the trial court's ruling. *San Paolo* Pet. App. A-32 (quoting *Crawford* v. *Southern Pacific Co.*, 45 P.2d 183, 184 (1935)).

San Paolo petitioned for certiorari, noting that the Court of Appeal's decision raised the question then pending before this Court in *Cooper Industries*. Pet. for Cert. (No. 00-1457) at 18-19. This Court granted, vacated, and remanded the decision for consideration in light of *Cooper Industries*. 121 S. Ct. 2190. It should do the same here.

CONCLUSION

For the foregoing reasons, the petition should be granted, the judgment below vacated, and the case remanded for further consideration in light of *Cooper Industries* v. *Leatherman Tool Group*.

Respectfully submitted,

MITCHELL C. TILNER
PETER ABRAHAMS
HORVITZ & LEVY L.L.P.
15760 Ventura Boulevard
18th Floor
Encino, California 91436
(818) 995-0800

JOHN G. ROBERTS, JR.*
CATHERINE E. STETSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

* Counsel of Record

Counsel for Petitioner